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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOHN WILLIAM ROSE III, Plaintiff and Appellant, v. IVY ROSE, Defendant and Respondent.	C084967 (Super. Ct. No. 34201400170221CUNPGDS)

John William Rose III (plaintiff) appeals from a judgment entered in favor of his former wife Ivy Rose (defendant) after the trial court granted defendant's summary judgment motion. The trial court concluded defendant established no triable issue of material fact existed, and defendant was entitled to judgment as a matter of law, with respect to plaintiff's causes of action for invasion of privacy, public disclosure of private facts, and intentional infliction of emotional distress (IIED). These causes of action arose out of allegations defendant, a nurse at Sutter Health Foundation (Sutter), and her boyfriend Derek Taggard, M.D., a neurosurgeon at Sutter, wrongfully accessed plaintiff's

medical records on two occasions and used the wrongfully-obtained information to aid defendant in the parties' underlying family law matter.

We conclude plaintiff produced sufficient circumstantial evidence to demonstrate the existence of triable issues relevant to his invasion of privacy and IIED causes of action. We shall therefore reverse the judgment and remand the matter to the trial court with directions to enter a new order denying the summary judgment motion as to those causes of action.

BACKGROUND

In accordance with the standard of review, we recite the facts in a light favorable to plaintiff as the losing party. (See *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

The parties were married for about six years and have two children together. They separated in late 2011. At the time of the separation, defendant was involved romantically with her coworker, Dr. Taggard. As a neurosurgeon at Sutter, Dr. Taggard had access to a database of patient medical records. In order to access a patient's records, he was required to log into the system with a username and password and then input the patient's name or medical records number.

Relevant 2012 Events

In August 2012, plaintiff was arrested for driving under the influence (DUI) after defendant informed police he had dropped off their children while visibly intoxicated. The following day, he was involuntarily admitted to the Sutter emergency department. He was taken there by police officers after they determined he presented a danger to himself or others (see Welf. & Inst. Code, § 5150).

Plaintiff remained at Sutter overnight and was then transferred to Heritage Oaks Psychiatric Hospital (Heritage Oaks), where he remained for five days. While still at Sutter, plaintiff told a patient advocate that his ex-wife, her mother and boyfriend, and

various friends worked at Sutter. He requested his stay at the hospital, and the reason he was admitted, be kept confidential and expressed concern that defendant would use the information against him in their ongoing dispute over custody of their children. Plaintiff was assured his stay at the hospital, and the reason for it, would be kept confidential. However, the following morning, prior to being transferred to Heritage Oaks, plaintiff observed his name and medications were written on a white board outside his room, visible to anyone walking through that part of the emergency department.

On October 12, 2012, defendant filed a declaration in the parties' family law matter in support of her request for child support. The declaration noted defendant had full-time custody of the children since the August incident resulting in plaintiff being arrested on suspicion of DUI and further stated: "I continue to be concerned about [plaintiff's] health and well-being and his ability to parent our children. It is my understanding that subsequent to the events which occurred in August, [plaintiff] was a patient at Heritage Oaks Psychiatric Hospital for approximately 5 days. I have not been provided with sufficient information regarding the reasons why [plaintiff] was hospitalized in August."

On October 20, 2012, Dr. Taggard accessed plaintiff's medical records. He had no legitimate reason for doing so.

At some point following plaintiff's Heritage Oaks hospitalization, he encountered one of defendant's friends, Tina Mercer. When plaintiff said hello to her, she responded: "We're not friends. Quit trying to be my friend. Go back to the crazy house."

Relevant 2014 Events

On September 8, 2014, Dr. Taggard again accessed plaintiff's medical records, specifically looking at medications he was prescribed. He again had no legitimate reason for accessing this information.

Four days later, as part of the ongoing family law matter, the parties met with a marriage and family therapist, Bijili Abbey, for the latter to provide a custody recommendation to the family court.[1] During that meeting, defendant referenced and expressed concern about two prescription medications plaintiff was then taking, temazepam and diazepam. Plaintiff was prescribed those medications in September 2012 and continued taking them until shortly after the meeting with Abbey.

Following the meeting, plaintiff suspected defendant and Dr. Taggard of unlawfully accessing his medical records. He contacted Sutter's privacy office and was informed Dr. Taggard had done so.

The Lawsuit

In October 2014, plaintiff sued defendant, Dr. Taggard, and Sutter, asserting causes of action for (1) invasion of privacy, (2) public disclosure of private facts, (3) false light, (4) IIED, and (5) negligence. The first four causes of action were asserted against defendant and Dr. Taggard, while the fifth cause of action was asserted against Sutter. Because this appeal involves only the grant of summary judgment in favor of defendant, and challenges that ruling only with respect to the first, second, and fourth causes of action, we confine our summary of the complaint to those causes of action and mention the other two no further.

With respect to the first cause of action, plaintiff alleged defendant and Dr. Taggard intentionally intruded into his private medical records, such intrusion was highly

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[1] In plaintiff's deposition, he referred to Abbey as the parties' "court-appointed mediator." In his declaration submitted in opposition to the summary judgment motion, he refers to the meeting with Abbey as a "child custody counseling session" and "not a mediation." For reasons we explain in the discussion portion of the opinion, we need not determine whether the session was a mediation, or whether plaintiff is estopped by his deposition testimony to deny Abbey's status as their court-appointed mediator.

offensive to a reasonable person, and he was damaged by both the intrusion and by their subsequent publicization of certain contents of those records, specifically his involuntary admission to Heritage Oaks and his prescriptions for temazepam and diazepam. With respect to the second cause of action, plaintiff alleged defendant and Dr. Taggard publicly disclosed the foregoing private facts and either knew a reasonable person in plaintiff's position would find such disclosure to be highly offensive or acted in reckless disregard of the highly offensive nature of the disclosure. Plaintiff further alleged the disclosure of these facts was not a matter of legitimate public concern. With respect to the fourth cause of action, plaintiff alleged the foregoing conduct was extreme and outrageous, defendant and Dr. Taggard engaged in such conduct in reckless disregard of the probability plaintiff would suffer emotional distress, and this extreme and outrageous conduct in fact caused plaintiff to suffer severe emotional distress.

Summary Judgment Motion

Defendant moved for summary judgment. Based on three purportedly undisputed facts, she argued plaintiff could not establish a claim of invasion of privacy against her. These claimed facts are: (1) Dr. Taggard accessed plaintiff's medical records; (2) defendant did not do so; and (3) Dr. Taggard did not share any information from plaintiff's medical records with her. In support of the first fact, defendant cited plaintiff's deposition in which he testified the person he spoke with from Sutter's privacy office informed him Dr. Taggard had accessed his medical records. In support of the latter two purported facts, defendant cited her own declaration, in which she stated: "I have never accessed [plaintiff's] medical record" and "[Dr. Taggard] did not share any information from [plaintiff's] medical record with me." She also cited a declaration submitted by Sharri Kalgren, Sutter's privacy officer, in which Kalgren stated: "I performed a chart audit to determine whether [defendant] and two other individuals had accessed

[plaintiff's electronic medical record (EMR)]. I found no indication that [defendant] accessed [plaintiff's] EMR."

Defendant argued plaintiff could not establish a claim for public disclosure of private facts against her because "the alleged publications to [Abbey] and in the court filing were privileged pursuant to the mediation privilege and the litigation privilege, and any disclosures to a single individual, such as Tina Mercer, do not constitute wide dissemination." With respect to defendant's disclosure of plaintiff's admission to Heritage Oaks, defendant relied on the undisputed fact she disclosed that information in a declaration filed in the family law matter. While not admitting to disclosing the same information to Mercer, defendant did not deny having done so, and acknowledged Mercer "may also have known about plaintiff's admission to Heritage Oaks." With respect to the disclosure of plaintiff's prescribed medications to Abbey, defendant relied on portions of plaintiff's deposition testimony, in which he referred to their meeting with Abbey as "mediation" and referred to Abbey as their "court-appointed mediator."

Defendant argued plaintiff could not establish a claim for IIED against her because he "cannot establish extreme and outrageous conduct by [defendant]." As with the first cause of action, defendant relied on the undisputed fact that Dr. Taggard accessed plaintiff's medical records and the purported undisputed fact that she did not do so. And as with the second cause of action, defendant relied on the mediation and litigation privileges to shield her from liability for disclosing plaintiff's admission to Heritage Oaks to the family court and his prescription medications to Abbey. In addition to these claimed privileges, defendant argued her disclosure of such information in the context of the family law matter was not extreme and outrageous. Finally, while neither admitting nor denying telling Mercer about plaintiff's involuntary stay at Heritage Oaks, she argued there was "no evidence that [Mercer]'s comment [i.e., 'Go back to the crazy house'] was

a literal statement and that if it was, that the information came from [defendant] or the context in which it was shared with [Mercer]."

Plaintiff's Opposition

Plaintiff opposed the summary judgment motion. Regarding his invasion of privacy claim, plaintiff disputed defendant's assertions that she neither accessed his medical records nor received any information from Dr. Taggard regarding those records. He first noted Kalgren's statement that her chart audit revealed "no indication" that defendant accessed the records does not establish she did not do so either using Dr. Taggard's login information or "in concert with him."

Plaintiff also argued the following evidence supported a reasonable inference defendant was lying in her declaration when she stated she did not access the records or receive information from Dr. Taggard about their content. First, while defendant claimed in her declaration she first learned of plaintiff's Heritage Oaks admission from his brother Sean during a phone call, plaintiff submitted a declaration from Sean stating: "I did not advise [defendant] that my brother had been admitted to Heritage Oaks Hospital nor did I imply in any way that he had been admitted anywhere. In fact, my brother had not been admitted to Heritage Oaks at the time of my call with [defendant] and I had no idea of the existence of Heritage Oaks at the time of the call. [Defendant] did not learn from me that my brother had been admitted to Heritage Oaks Hospital." Second, defendant also claimed in her declaration in support of the summary judgment motion that she received documents detailing plaintiff's Heritage Oaks admission in connection with the family law matter. While true, plaintiff pointed out in his opposition that these documents were received over a month after defendant filed her declaration in that matter revealing she already knew about the admission at the time she received these documents.

Third, while defendant claimed in her declaration in support of the summary judgment motion that she became aware he possessed diazepam and temazepam

during the time they lived together, plaintiff submitted his own declaration stating he neither took nor had a prescription for either of those medications during the marriage and was prescribed both medications in September 2012 after his release from Heritage Oaks. Plaintiff argued, "[t]he fact that she proffers false testimony here on these key issues demonstrates a triable issue of material fact requiring a jury to determine her credibility."

Plaintiff further relied on the timing of defendant's disclosure to Abbey concerning his prescription medications, just four days after Dr. Taggard accessed his medical records and specifically searched for plaintiff's prescriptions, to support "the very reasonable inference" defendant acted in concert with her boyfriend to access that information for the very purpose of using it during the meeting with Abbey.

With respect to plaintiff's second cause of action for public disclosure of private facts, he argued the mediation privilege did not apply because he and defendant were not "involved in mediation," but were instead participating in "family court counseling." He also argued the litigation privilege did not apply because defendant's activities, i.e., "access[ing] and disseminat[ing] her ex-husband's medical and mental health information to at least [two] particular people and then broadly by posting it on a medium open to public inspection" amounted to conduct and not communication.

Finally, relying on the same factual disputes noted above with respect to his invasion of privacy claim, plaintiff argued triable issues of material fact exist regarding his IIED claim. Plaintiff urged the trial court not to "endorse [defendant's invasion of his privacy] as something other than outrageous."

Defendant's Reply and Evidentiary Objections

In her reply to plaintiff's opposition, defendant disputed the existence of any material factual dispute regarding whether or not she accessed plaintiff's medical records. "At most," she argued, "there is a dispute of fact concerning whether [she] obtained

information from certain documents and from [plaintiff]'s brother." Such a dispute, she continued, "does not mean that [she] intentionally accessed [plaintiff]'s medical records to learn that information, or that the source of the information was even [his] medical records." In support of this argument, defendant pointed to a statement in plaintiff's separate statement of undisputed material facts in opposition to the motion, i.e., that defendant might have "learned of [the Heritage Oaks] admission from either [Sutter] staff or from her or an acquaintance viewing the white board in the emergency department." Defendant also argued that because plaintiff did not present his medical records in opposition to the motion, "there is no evidence that any of [the] information that [she] had is even contained in [plaintiff]'s medical records."

We finally note with respect to the claimed mediation privilege, defendant argued plaintiff was "precluded from presenting a declaration in opposition to [defendant]'s motion for summary judgment indicating that [her] statements were not made in mediation." This is so, she argued, because plaintiff's deposition testimony admitted the meeting with Abbey was a mediation and "a party's deposition testimony may not be contradicted by the party's own self-serving declaration in opposition to a motion for summary judgment." This argument also served as the basis for defendant's objections to portions of plaintiff's declaration denying the parties were involved in mediation.

Trial Court's Ruling

The trial court granted the summary judgment motion. With respect to plaintiff's invasion of privacy claim, the trial court concluded plaintiff did not produce any evidence disputing defendant's assertion in her declaration, corroborated by Kalgren's declaration, that she did not access plaintiff's medical records. The trial court viewed evidentiary disputes as to how plaintiff learned the information she shared with Abbey and the family court, and perhaps Mercer, as "irrelevant" to the question of whether

she accessed these medical records. With respect to plaintiff's cause of action for public disclosure of private facts, the trial court concluded defendant's statements, except for the possible disclosure to Mercer, were made during the family law matter and protected by the litigation privilege. As for the potential disclosure outside of the legal proceedings, the trial court noted this cause of action required disclosure to "more than one person." Finally, with respect to the IIED claim, having already determined plaintiff had not produced evidence disputing defendant's assertion that she did not access his medical records, the trial court concluded defendant's use of "[truthful information] alleged to be from plaintiff's medical records" in order to "express[] concern in the family court, for the wellbeing and safety of her children," did not amount to "outrageous" conduct.

After granting defendant's summary judgment motion, the trial court entered a judgment of dismissal. This appeal followed.

DISCUSSION

I

Summary Judgment Principles

We begin by summarizing several principles that govern the grant and review of summary judgment motions under section 437c of the Code of Civil Procedure.[2]

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. [Citation.] The burden of persuasion remains with the party moving for summary judgment. [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 (*Kahn*); § 437c, subd. (c).) Thus, a defendant moving for summary

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[2] Undesignated statutory references are to the Code of Civil Procedure.

judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; § 437c, subd. (*o*)(2).) Such a defendant also "bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to [plaintiff] to demonstrate the existence of a triable issue of material fact." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1250 (*Laabs*).)

On appeal from the entry of summary judgment, "[w]e review the record and the determination of the trial court de novo." (*Kahn*, *supra*, 31 Cal.4th at p. 1003.) And in determining whether there exist any triable issues of material fact, we strictly construe the moving party's evidence and liberally construe the opposing party's evidence. (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1543.)

II

Analysis

Plaintiff contends the trial court erred in concluding defendant carried her burden of establishing the nonexistence of triable issues of material fact such that she was entitled to judgment as a matter of law with respect to his invasion of privacy, public disclosure of private facts, and IIED causes of action. We conclude summary adjudication of plaintiff's public disclosure of private facts cause of action was proper; not so with respect to the invasion of privacy and IIED causes of action.

A.

Invasion of Privacy by Intrusion

The common law tort of invasion of privacy by intrusion "has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly

offensive to a reasonable person." (*Sanders v. American Broadcasting Companies, Inc.* (1999) 20 Cal.4th 907, 914.)

Defendant does not dispute an intrusion into a private place occurred or that a reasonable person would have been highly offended by the intrusion. For good reason. Plaintiff "had a legally protected privacy interest in [his] mental health records." (*Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1295.) "In determining the ' "offensiveness" ' of an invasion of a privacy interest, common law courts consider, among other things: 'the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he [or she] intrudes, and the expectations of those whose privacy is invaded.' [Citation.]" (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26.) We have no difficulty concluding plaintiff had a reasonable expectation of privacy in the confidentiality of his mental health records and that a reasonable person in his position would have been highly offended by the intrusion into those records that occurred in this case.

Defendant does dispute her involvement in the intrusion. More than that, she denied accessing plaintiff's medical records in a declaration in support of her summary judgment motion, supporting that denial with a declaration from Kalgren, Sutter's privacy officer, stating Kalgren's audit of the medical records system revealed "no indication" defendant did so. Defendant argues plaintiff has offered no evidence in opposition to the motion from which a reasonable jury could conclude otherwise. Beginning with defendant's "initial burden of production to make a prima facie showing that no triable issue of material fact exists" (*Laabs, supra,* 163 Cal.App.4th at p. 1250), a simple denial that she accessed plaintiff's medical records, even supported by undisputed evidence Dr. Taggard was the one who physically logged into the system and accessed the records, does not demonstrate no triable issue of material fact exists. This is because

the complaint alleges defendant and Dr. Taggard "acted in concert or coordination with each other" and were in an agency relationship. Thus, even undisputed evidence that defendant did not personally access the records does not show Dr. Taggard did not do so on her behalf or in coordination with her.

Defendant also denied in her declaration that Dr. Taggard shared any information from plaintiff's medical records with her. But this denial, even if undisputed, likewise does not negate her liability for invasion of privacy because it does not show Dr. Taggard did not access the records on her behalf and in her presence, thereby obviating the need to tell her about the contents. While plaintiff has no direct evidence this was the factual scenario in which his records were accessed, in the first stage of the summary judgment analysis, the burden of production is on the moving party to show no triable issue of material fact exists. In short, the three asserted facts relied upon by defendant, even if undisputed, would not entitle her to a judgment in her favor as a matter of law.

Moreover, even if the burden of production shifted to plaintiff to demonstrate the existence of a triable issue of material fact, he carried that burden. In this regard, we note plaintiff does not dispute Dr. Taggard was the one who personally accessed his medical records. He does dispute defendant's assertions she did not access these records and did not receive any information about them from Dr. Taggard. As plaintiff correctly observes, Kalgren's statement that her chart audit revealed no indication defendant accessed the records does not establish Dr. Taggard did not do so on her behalf or in concert with her. And while plaintiff does not possess direct evidence of a conspiracy between defendant and Dr. Taggard to violate his privacy, conspiracies to violate the law "are not ordinarily susceptible of direct proof but must be spelled out from circumstantial evidence." (*Dandini v. Dandini* (1953) 120 Cal.App.2d 211, 214.)

Here, at least with respect to the 2014 incursion into plaintiff's medical records, the jury could reasonably infer from the circumstantial evidence produced by plaintiff in

opposition to the summary judgment motion that Dr. Taggard accessed his records on defendant's behalf or in concert with her. As previously set forth in greater detail, defendant and Dr. Taggard were involved in a romantic relationship and living together at the time of this breach. In the midst of custody proceedings between defendant and plaintiff, Dr. Taggard breached the confidentiality of plaintiff's medical records and specifically looked at plaintiff's prescription medications. He did so *four days before* a counseling or mediation session in which defendant disclosed to the counselor/mediator the two medications plaintiff had been prescribed following his admission to Heritage Oaks in 2012. While defendant claimed in her declaration in support of the summary judgment motion that she became aware plaintiff possessed diazepam and temazepam during the time they lived together, plaintiff submitted his own declaration stating he neither took nor had a prescription for either of those medications during the marriage. Thus, in addition to the relationship between defendant and Dr. Taggard, the timing of Dr. Taggard's breach of plaintiff's medical records, and defendant's subsequent use of information Dr. Taggard admitted searching for during the breach, the jury also would have evidence from which to conclude defendant was lying about how she came to possess knowledge of plaintiff's prescription medications. From this, the jury would be justified in disbelieving her testimony in its entirety, including her claim that she did not access plaintiff's medical records. (See *Nelson v. Black* (1954) 43 Cal.2d 612, 613 [based on conflict between plaintiff's testimony and other evidence, jury could have reasonably concluded he testified falsely about those matters and regarded all of his testimony as false].)

Moreover, plaintiff also produced evidence from which the jury could conclude defendant also lied about how she came to possess knowledge of plaintiff's involuntary admission to Heritage Oaks. As previously set forth in greater detail, while defendant claimed in her declaration in support of the summary judgment motion that she first

learned of the Heritage Oaks admission from plaintiff's brother Sean during a phone call, plaintiff submitted a declaration from Sean denying he gave her any such information, or even knew about plaintiff's admission to Heritage Oaks at the time of the phone call. Again, if the jury were to credit Sean's testimony, it could reasonably conclude defendant lied about her phone call with him and also disbelieve the remainder of her testimony. (See *Nelson v. Black*, *supra*, 43 Cal.2d at p. 613.)

We do acknowledge, as defendant points out, she could not have obtained the information regarding plaintiff's Heritage Oaks admission from Dr. Taggard's first breach of his medical records because that breach occurred about a week after defendant disclosed to the family court that plaintiff had been a patient at that hospital. We also acknowledge, as did plaintiff in his separate statement, that defendant could have received this information from any number of sources, including the white board in the Sutter emergency department. However, we need not determine whether or not a jury could reasonably conclude defendant was involved in Dr. Taggard's first breach of the medical records. We do conclude, based on the totality of the circumstantial evidence produced by plaintiff in opposition to the summary judgment motion, that there exists a triable issue of material fact concerning whether or not defendant was involved in the second breach of those records.

The trial court erred in granting summary judgment in defendant's favor with respect to plaintiff's first cause of action for invasion of privacy by intrusion.

B.

Invasion of Privacy by Public Disclosure of Private Facts

The common law tort of invasion of privacy by public disclosure of private facts has four elements: " '(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate

public concern.' [Citations.]" (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.)

Plaintiff argues the trial court erred in concluding the litigation privilege shielded defendant from liability as a matter of law and also claims the mediation privilege is inapplicable to defendant's disclosure of his prescription medications to Abbey. He does not take issue with the trial court's conclusion that any disclosure of plaintiff's Heritage Oaks admission to Mercer was not a "public disclosure" as a matter of law. Indeed, as our Supreme Court has explained, "common law invasion of privacy by public disclosure of private facts requires that the actionable disclosure be widely published and not confined to a few persons or limited circumstances." (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 27.) While this consideration arguably also applies to the disclosure of plaintiff's prescription medications to Abbey, we need not decide the matter, nor must we determine whether or not the mediation privilege applies to that particular disclosure, because we conclude the litigation privilege applies to both the disclosure of plaintiff's Heritage Oaks admission to the family law court and the disclosure of plaintiff's prescription medications to Abbey.

Civil Code section 47 provides in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding." (Civ. Code, § 47, subd. (b).) "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)

As this court stated in *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296 (*Wise*): "The litigation privilege is absolute, which means it applies regardless of the existence of malice or intent to harm. [Citation.] 'Although originally enacted with reference to defamation actions alone [citation], the privilege has been extended to *any*

communication, whether or not it is a publication, and to *all* torts other than malicious prosecution. [Citations.]' [Citation.] The privilege vindicates several public policies: 'The principal one is ensuring free access to the courts by prohibiting derivative tort actions. [Citation.] The privilege also promotes complete and truthful testimony, encourages zealous advocacy, gives finality to judgments, and avoids unending litigation. [Citation.]' [Citation.]" (*Id.* at p. 1302.)

In *Wise, supra*, 83 Cal.App.4th 1296, we concluded a spouse's use of the other spouse's prescription drug information in a dissolution proceeding to persuade the family court the latter spouse was not deserving of custody of the parties' children is protected by the privilege, explaining: "Case law is clear that [Civil Code] section 47[, subdivision](b) absolutely protects litigants and other participants from being sued on the basis of communications they make in the context of family law proceedings. [Citations.] Any other rule would surely spawn a second layer of litigation between a former spouse or a spouse currently seeking a dissolution whose goal it is to make his or her former partner's life miserable." (*Id.* at p. 1302.) Rejecting the argument that the plaintiff spouse's right to privacy should prevail over the litigation privilege, we explained such an outcome would be inconsistent with our Supreme Court's pronouncements that "the privilege is absolute and precludes recovery on all tort theories, *including* claims for invasion of privacy." (*Id.* at pp. 1302-1303.)

Similarly, here, defendant disclosed confidential information from plaintiff's medical records, i.e., his admission to Heritage Oaks, in a declaration filed in the family court to express concern about his "health and well-being and his ability to parent [their] children." For the reasons expressed in *Wise, supra,* 83 Cal.App.4th 1296, this disclosure is absolutely privileged. As a matter of law, plaintiff is precluded from recovering any damages for invasion of privacy by public disclosure of private facts based on this disclosure.

Turning to the disclosure of plaintiff's prescription medications to Abbey, this is precisely the disclosure we held in *Wise, supra,* 83 Cal.App.4th 1296 to be protected, and it is likewise protected here so long as the litigation privilege is broad enough to cover disclosures to a court-appointed therapist in the context of meeting with litigants preparatory to submitting a child custody recommendation to the family court. We conclude it is.

In *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, our colleagues at the Second Appellate District concluded the litigation privilege shielded a court-appointed therapist against causes of action alleging tortious conduct based on that therapist's statements made during a session with the plaintiff conducted in relation to a dissolution matter. With respect to the first element of the privilege, the court concluded the statements were made in a judicial proceeding, citing our Supreme Court's guidance that the privilege applies " 'even though the publication is made outside the courtroom and no function of the court or its officers is involved.' " (*Id*. at p. 863, quoting *Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 212.) With respect to the second element, the court concluded the therapist was an authorized participant in the dissolution matter. Finally, the court concluded her statements were made to achieve the objects of the litigation and had some connection or logical relation to the action because they were related to "custody and visitation" and "were part of a process undertaken by the husband and wife to aid the court in its decision" concerning these matters. (*Id*. at pp. 863-864.)

Here, too, defendant's disclosure of plaintiff's prescription medications was made as part of a judicial proceeding regardless of the fact the statement was made to a court-appointed therapist outside of the courtroom. The disclosure was made by a litigant in the family law matter in order to achieve the objects of the litigation, i.e., obtain an advantage concerning custody of the parties' children, and for this reason was also logically related to the litigation. The litigation privilege applies.

The trial court properly concluded plaintiff's second cause of action for invasion of privacy by public disclosure of private facts was barred as a matter of law by the litigation privilege.

C.

Intentional Infliction of Emotional Distress

Finally, for the same reasons we concluded a triable issue of material fact exists with respect to plaintiff's first cause of action, we also conclude such an issue exists with respect to his fourth cause of action for IIED. This cause of action has three elements: " ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . ." Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

Defendant's motion sought summary judgment as to this cause of action based only on a purported lack of evidence her conduct was extreme and outrageous. The trial court ruled in her favor on that basis. This was error. As we have already explained, there is a triable issue of material fact concerning whether or not defendant unlawfully accessed plaintiff's confidential medical records through her boyfriend, Dr. Taggard, in order to use that information in the parties' ongoing family law matter. We also explained a jury could conclude a reasonable person in plaintiff's position would have been highly offended by such an intrusion into those records. Without determining whether all highly offensive intrusions into a person's privacy also amount to conduct that exceeds all bounds tolerated in a civilized society, we conclude a reasonable jury could find defendant's conduct, if adequately proven at trial, exceeds those bounds. (See

Rest.2d Torts, § 46, com. h [noting the court must determine, in the first instance, whether conduct "may reasonably be regarded as so extreme and outrageous as to permit recovery," but where reasonable minds may differ, "it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability"].)

The trial court erred in granting summary judgment in defendant's favor with respect to plaintiff's fourth cause of action for IIED.

DISPOSITION

The judgment of dismissal entered in favor of defendant Ivy Rose is reversed and the matter is remanded to the trial court with directions to (1) vacate its order granting summary judgment in her favor and (2) enter a new order granting the motion as to the second and third causes of action and denying the motion as to the first and fourth causes of action. Plaintiff John William Rose III shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
MAURO, J.